Congressional Research Service
Informing the legislative debate since 1914

Crime and Forfeiture: In Short

Charles Doyle
Senior Specialist in American Public Law

January 22, 2015

Congressional Research Service
7-5700
www.crs.gov
RS22005

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Forfeiture has long been an effective law enforcement tool. Congress and state legislatures have authorized its use for over 200 years. Every year, it redirects property worth billions of dollars from criminal to lawful uses. Forfeiture law has always been somewhat unique. Legislative bodies, commentators, and the courts, however, had begun to examine its eccentricities in greater detail because under some circumstances it could be not only harsh but unfair. The Civil Asset Forfeiture Reform Act (CAFRA), P.L. 106-185, 114 Stat. 202 (2000), was a product of that reexamination.

Modern forfeiture follows one of two procedural routes. Although crime triggers all forfeitures, they are classified as civil forfeitures or criminal forfeitures according to the nature of the procedure that ends in confiscation. Civil forfeiture is an in rem proceeding. The property is the defendant in the case. Unless the statute provides otherwise, the innocence of the owner is irrelevant—it is enough that the property was involved in a violation to which forfeiture attaches. As a matter of expedience and judicial economy, Congress often allows administrative forfeiture in uncontested civil confiscation cases. Criminal forfeiture is an in personam proceeding, and confiscation is only possible upon the conviction of the owner of the property.

The Supreme Court has held that authorities may seize moveable property without prior notice or an opportunity for a hearing but that real property owners are entitled as a matter of due process to preseizure notice and a hearing. As a matter of due process, innocence may be irrelevant in the case of an individual who entrusts his or her property to someone who uses the property for criminal purposes. Although some civil forfeitures may be considered punitive for purposes of the Eighth Amendment's excessive fines clause, civil forfeitures do not implicate the Fifth Amendment's double jeopardy clause unless they are so utterly punitive as to belie remedial classification.

The statutes governing the disposal of forfeited property may authorize its destruction, its transfer for governmental purposes, or deposit of the property or of the proceeds from its sale in a special fund. Intergovernmental transfers and the use of special funds are hallmarks of federal forfeiture. Every year federal agencies transfer hundreds of millions of dollars and property to state, local, and foreign law enforcement officials as compensation for their contribution to joint enforcement efforts.

This is an abridged version of CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle, a longer report from which citations, footnotes, and attachments have been stripped.

Contents

Contacts

Background

Congress and state legislatures have authorized the use of forfeiture for over two hundred years. Forfeiture law has always been somewhat unique. Its increased use has highlighted its eccentricities and attendant policy concerns. Present forfeiture law has its roots in early English law. It is reminiscent of three early English procedures: deodands, forfeiture of estate or common law forfeiture, and statutory or commercial forfeiture. At early common law, the object that caused the death of a human being—the ox that gored, the knife that stabbed, or the cart that crushed—was confiscated as a deodand. Coroners' inquests and grand juries, bound with the duty to determine the cause of death, were obligated to identify the offending object and determine its value. The Crown distributed the proceeds realized from the confiscation of the animal or deadly object for religious and charitable purposes in the name of the deceased. Although deodands were not unknown in the American colonies, they appear to have fallen into disuse or been abolished by the time of the American Revolution or shortly thereafter. In spite of their limited use in this country, deodands and the practice of treating the offending animal or object as the defendant have frequently been cited to illustrate the characteristics of modern civil forfeiture.

Forfeiture of estate or common law forfeiture, unlike deodands, focused solely on a human offender. At common law, anyone, convicted and attained for treason or a felony, forfeited all his lands and personal property. Attainder, the judicial declaration of civil death, occurred as a consequence of the pronouncement of final sentence for treason or felony. In colonial America, common law forfeitures were rare. After the Revolution, the Constitution restricted the use of common law forfeiture in cases of treason, and Congress restricted its use, by statute, in the case of other crimes.

The third antecedent of modern forfeiture, statutory or commercial forfeiture, figured prominently in cases in admiralty and on the revenue side of the Exchequer in precolonial England. It was used fairly extensively against smuggling and other revenue evasion schemes in the American colonies and has been used ever since. In most instances, the statutes called for in rem confiscation proceedings in which, as with deodands, the offending object was the defendant; occasionally, they established *in personam* procedures where confiscation occurred as the result of the conviction of the owner of the property. Although contemporary American forfeiture law owes much to the law of deodands and the law of forfeiture of estate, it is clearly a descendant of English statutory or commercial forfeiture.

Property and Trigger Crimes

Modern forfeiture is a creature of statute. While there are some common themes and general patterns concerning the crimes that trigger forfeiture, the property subject to confiscation, and the procedures associated with forfeiture, federal forfeiture statutes are matters of legislative choice and can vary greatly. Virtually every kind of property, real or personal, tangible or intangible, may be subject to confiscation under the appropriate circumstances. The laws that call for the confiscation of contraband per se, property whose very possession has been outlawed, were at one time the most prevalent, and can still be found. Property—particularly vehicles—used to facilitate the commission of a crime and without which violation would be less likely, has long been the target of confiscatory statutes as well. In some instances, Congress has focused upon the profits of crime and authorized the confiscation of the direct and indirect proceeds of illegal activities.

And under some circumstances, it has authorized the forfeiture of substitute assets, when the tainted property subject to confiscation under a particular statute has become unavailable.

Traditionally, the crimes which triggered forfeiture were (1) those that threatened the government's revenue interest, for example, smuggling, tax evasion, hunting or fishing without a license, or (2) those crimes that because of their perceived threat to public health or morals might have been considered public nuisances subject to abatement, for example, gambling, or dealing in obscene material, or illicit drug use. Beginning with the racketeering statutes, a number of jurisdictions have created another category of forfeiture warranting offenses—crimes that involve substantial economic gain for the defendant even if not at the expense of government revenues, but which may greatly enhance government revenues, for example, racketeering and money laundering. A prime example of this approach is the Civil Asset Forfeiture Reform Act (CAFRA), which makes forfeitable, among other things, the proceeds from any of the crimes upon which a money laundering or RICO prosecution might be based. Following the terrorist attacks on September 11, 2001, Congress authorized the confiscation of another type of crime-related property—property owned by certain terrorists regardless of whether the property is traceable, used to facilitate, or connected in any other way to any practical crime.

Civil Forfeiture

Forfeiture follows one of two procedural routes: criminal or civil. Although crime triggers all forfeitures, they are classified as civil forfeitures or criminal forfeitures according to the nature of the judicial procedure which ends in confiscation. Criminal forfeitures are part of the criminal proceedings against the property owner, and confiscation is only possible upon the conviction of the owner of the property and only to the extent of defendant's interest in the property. Civil forfeitures are accomplished using civil procedure. Civil forfeiture is ordinarily the product of a civil, in rem proceeding in which the property is treated as the offender. Within the confines of due process and the language of the applicable statutes, the guilt or innocence of the property owner is irrelevant; it is enough that the property was involved in a crime to which forfeiture attaches in the manner in which statute demands. Some civil forfeitures are accomplished administratively; some are not. Administrative forfeitures are, in oversimplified terms, uncontested civil forfeitures.

As a general rule, since the proceedings are in rem, actual or constructive possession of the property by the court is a necessary first step in any confiscation proceeding. The arrest of the property may be accomplished either by warrant under the Federal Rules of Criminal Procedure; or, if judicial proceedings have been filed, by a warrant under the Supplemental Rules of Certain Admiralty and Maritime Claims; or without warrant, if there is probable cause and other grounds under which the Fourth Amendment permits a warrantless arrest; or pursuant to equivalent authority under state law. Because realty cannot ordinarily be seized until after the property owner has been given an opportunity for a hearing, the procedure differs slightly in the case of real property.

Administrative Forfeitures

In the interests of expediency and judicial economy, Congress has sometimes authorized the use of administrative forfeiture as the first step after seizure in "uncontested" cases. It may be somewhat misleading to characterize administrative forfeitures as uncontested forfeitures, given

the procedural obstacles that the government and claimants must overcome before the government is put to its burden in a judicial proceeding. For the government the procedure begins with seizure of the property. It must notify anyone with an interest in the property and provide an opportunity to request judicial forfeiture proceedings. Anyone with an interest in the property may contest confiscation with a verified claim under the Supplemental Rules. The period within which a claimant must register his or her intent to contest can be a fairly narrow window. Moreover, the government may petition the court to dismiss a claim for want of statutory standing, which in turn may require the claimant to establish that he lawfully obtained the targeted property.

If there are no viable claims, the property is summarily declared forfeited. When administrative forfeiture is unavailable, when a claimant has successfully sought judicial proceedings, or when the government has elected not to proceed administratively, the government may begin civil judicial proceedings by filing either a complaint or a libel against the property. In money laundering and other civil forfeitures governed by CAFRA, the government must establish that the property is subject to confiscation by a preponderance of the evidence. In cases such as those arising under the customs laws and cases filed before the effective date of CAFRA amendments, the government must establish probable cause to believe that the property is subject to forfeiture.

If the government overcomes the initial obstacle, a claimant may successfully challenge confiscation on several grounds. He or she may be able to show that the predicate criminal offense did not occur or that his or her property lacks the statutorily required nexus to the crime. For example, when the government claims that property is forfeitable because it was used to commit or to facilitate the commission of a crime, it must "establish that there was a substantial connection between the property and the offense." A claimant's innocence or even acquittal only bars civil forfeiture to the extent that a statute permits or due process requires. For most civil forfeitures, other than those arising under the tax or customs laws, CAFRA establishes two "innocent owner" defenses. The first is available to claimants either who were unaware that their property was being criminally used or who did all that could be reasonably expected of them to prevent criminal use of their property. The second is for good-faith purchasers who did not know of the taint on the property at the time they acquired their interest. Even when the government establishes that property is subject to civil forfeiture, CAFRA affords a claimant the right to a judicial reduction of the amount of the confiscation, if the court determines the extent of the forfeiture is excessive in view of the gravity of the offense and claimant's culpability.

Criminal Forfeiture

Once less frequently invoked than civil forfeiture, criminal forfeiture appears to have become the procedure of choice when judicial proceedings are required. CAFRA added to the federal crimes punishable by criminal forfeiture various offenses involving unlawful money transmission, counterfeiting, identify fraud, credit card fraud, computer fraud, theft related to motor vehicles, health care fraud, telemarketing fraud, bank fraud, and immigration-related offenses. Like civil forfeiture, criminal forfeiture is a creature of statute. Unlike civil forfeiture, criminal forfeiture follows as a consequence of conviction. It is punishment, even though it may also serve remedial purposes very effectively. While civil forfeiture treats the property as the defendant, confiscating the interests of the innocent and guilty alike, criminal forfeiture traditionally consumes only the property interests of the convicted defendant, and only with respect to the crime for which he is convicted. When the property subject to confiscation is unavailable following the defendant's

conviction, however, the court may order the confiscation of other property belonging to the defendant in its stead (substitute assets).

The indictment or information upon which the conviction is based must list the property that the government asserts is subject to confiscation. When the trial is conducted before a jury, either party may insist upon a jury determination of the forfeiture issue. Since the court's jurisdiction does not depend upon initial control of the res, it need not be seized before forfeiture is declared. Although the courts are authorized to issue pretrial restraining orders to prevent depletion or transfer of property that the government contends is subject to confiscation, many are hesitant to issue pretrial restraining orders covering substitute property. In any event, the defense to criminal forfeiture differs somewhat from the defense to civil forfeiture. For example, since conviction is a prerequisite to confiscation, an overturned conviction or an acquittal will ordinarily preclude criminal forfeiture. Third-party interests are less likely to be cut off by virtue of the property's proximity to criminal conduct simply because only the defendant's interest in the property is subject to confiscation and because bona fide purchaser exceptions are more common.

After conviction of the defendant and after it has met its burden of establishing forfeitability by a preponderance of the evidence, the government may elect to seek either confiscation of forfeitable property or a money judgment in the amount of its value. If the government seeks confiscation, the court must determine whether the statutory nexus between the property and the crime of conviction exists. If the government instead seeks a money judgment, the court must determine the amount the defendant must pay. At that point, the court issues a preliminary forfeiture order or order for a money judgment against the defendant in favor of the government. Upon the issuance of a preliminary forfeiture order, the government must proclaim its intent to dispose of the property and notify any third parties known to have an interest in the property. Third parties with a legal interest in the forfeited property, other than the defendant, are then entitled to a judicial hearing, provided they file a timely petition asserting their claims. Third-party claims may be grounded either in an assertion that they possessed a superior interest in the property at the time confiscation-trigger misconduct occurred, or that they are good-faith purchasers. When the government is awarded a money judgment, it is not limited to the forfeitable assets the defendant has on hand at the time, but may enforce the judgment against future assets as well.

Disposition of Forfeited Assets

Disposal of forfeited property is ordinarily a matter of statute. The pertinent statute may require that the proceeds of a confiscation be devoted to a single purpose such as the support of education or deposit in the general fund. The statute may call for the destruction of property that cannot be lawfully possessed; or authorize rewards, the settlement of claims against the property; or remission or mitigation. It may permit distribution of the proceeds or a portion thereof as victim restitution. Intergovernmental transfers and the use of special funds, however, are the hallmarks of the more prominent federal forfeiture statutes. The Attorney General and the Secretary of the Treasury enjoy wide latitude to equitably share, that is, to transfer confiscated property to federal, state, local, and foreign law enforcement agencies to the extent of their participation in the case. Nevertheless, both must be assured that the transfers will encourage law enforcement cooperation. This "equitable sharing" transfer authority includes adoptive forfeitures. Adoptive forfeiture occurs when property is forfeitable under federal law because of its relation to conduct, such as drug trafficking, which violates both federal and state law. The Department of Justice "adopts," for processing under federal law, a forfeiture case brought to it by state or local law

enforcement officials and in which the United States is not otherwise involved. Federal adoption is sometimes attractive because of the speed afforded by federal administrative forfeiture. It may also be attractive because forfeiture would be impossible or more difficult under state law or because law enforcement agencies would not share as extensively in the bounty of a successful forfeiture under state law. The Treasury and Justice Departments insist that state and local law enforcement agencies indicate the law enforcement purposes to which the transferred property is to be devoted and that the transfer will increase and not supplant law enforcement resources. Moreover, the Attorney General has prohibited adoption subject to narrow exceptions.

The lion's share of confiscated cash, or the proceeds from the sale of confiscated property, however, is now deposited in either the Department of Justice Asset Forfeiture Fund, or the Department of the Treasury Forfeiture Fund. The Treasury and Justice Department Funds, together, receive over $2 billion per year.

Constitutional Considerations

The Eighth Amendment states in its entirety that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." A "punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a defendant's offense." Forfeitures that Congress has designated as remedial civil sanctions do not implicate double jeopardy concerns unless "the statutory scheme [is] so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism."

The Sixth Amendment assures the accused in criminal proceedings the right to a jury trial, to the assistance of counsel, and to the confrontation of accusers. The Supreme Court long ago held that the right to confrontation does not apply in civil forfeiture cases, and has not revisited the issue. The right to the assistance of counsel in criminal cases does not prevent the government from confiscating tainted fees paid to counsel; or, upon a probable cause showing, from obtaining a restraining order to freeze assets preventing the payment of attorneys' fees; or entitle an otherwise indigent property owner to the appointment of counsel for substitute asset forfeiture proceedings. The Amendment is by its terms only applicable "in all criminal prosecutions," and consequently there is no constitutionally required right to assistance of counsel in civil forfeiture cases. The Court's opinion to the effect that there is no right to a jury trial on disputed factual issues in criminal forfeiture, rests on a somewhat battered foundation. The fact that criminal forfeiture is a penalty *within* "the prescribed statutory maximum" and that Rule 32.2 of the Federal Rules of Criminal Procedure affords an expanded jury determination right would seem to shield federal criminal forfeiture procedures from Sixth Amendment challenges.

Due process objections can come in such a multitude of variations that general statements are hazardous. Due process demands that those with an interest in the property which the government seeks to confiscate be given notice and opportunity for a hearing to contest. Actual notice is not required, but the government's efforts must be "reasonably calculated, under all the circumstances, to apprise" of the opportunity to contest. In some instances, due process permits the initiation of forfeiture proceedings by seizing the personal property in question without first giving the property owner either notice or the prior opportunity of a hearing to contest the seizure and confiscation. But absent exigent circumstances, the owner is entitled to the opportunity for a preseizure hearing in the case of real property where there is no real danger that the property will be spirited away in order to frustrate efforts to secure in rem jurisdiction over it. Due process also requires a probable cause determination of the forfeitability of property made subject to a post-

seizure, pretrial restraining order designed to prevent dissipation. Due process does not require an adversarial determination of the existence of probable cause; a grand jury indictment will do.

While due process clearly limits at some point the circumstances under which the property of an innocent owner may be confiscated, the Court has declined the opportunity to broadly assert that due process uniformly precludes confiscation of the property of an innocent owner. Any delay between seizure and hearing offends due process only when it fails to meet the test applied in speedy trial cases: Is the delay unreasonable given the length of delay, the reasons for the delay, the claimant's assertion of his or her rights, and prejudice to the claimant? In other challenges, the lower federal courts have found that due process permits: the procedure of shifting the burden of proof to a forfeiture claimant after the government has shown probable cause and allows use of a probable cause standard in civil forfeitures; postponement of the determination of third-party interests in criminal forfeiture cases until after trial in the main; an 11-year delay between issuance of a criminal forfeiture order and amendment of the original order to reach overseas assets; and fugitive disentitlement under 28 U.S.C. 2466.

Section 3 of Article III of the United States Constitution does not appear to threaten most contemporary forfeiture statutes. It provides in part that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." The section on its face seems to restrict forfeiture only in treason cases, but at least one court has suggested a broader scope. Even if Article III when read in conjunction with the due process clause reaches not only treason but all crimes, its prohibitions run only to forfeiture of estate. They do not address statutory forfeitures of the type currently found in state and federal law. The critical distinction between forfeiture of estate and statutory forfeiture is that in the first all of the defendant's property, related or unrelated to the offense and acquired before, during, or after the crime, is confiscated. In the second, confiscation is only possible if the property is related to the criminal conduct in the manner defined by the statute.

Article III also declares that the judicial power of the United States extends to certain cases and controversies. If a litigant has no judicially recognized interest in the outcome of such a case or controversy, he is said to lack standing and the court lacks jurisdiction to proceed. In some instances, a statute or rule imposes additional, more demanding standing requirements. So it is with civil forfeiture. As a threshold matter, however, a claimant must satisfy Article III standing requirements. In order to meet the case-or-controversy requirement of Article III, a plaintiff (including a civil forfeiture claimant) must establish the three elements of standing, namely, that the plaintiff suffered an injury in fact, that there is a causal connection between the injury and conduct complained of, and that it is likely the injury will be redressed by a favorable decision. Claimants in civil forfeiture actions can satisfy this test by showing that they have a colorable interest in the property, which includes an ownership interest or a possessory interest. Article III's standing requirement is thereby satisfied because the owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the seized property.

Author Contact Information

Charles Doyle
Senior Specialist in American Public Law
cdoyle@crs.loc.gov, 7-6968